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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

TOYRRIFIC, LLC ,

Plaintiff,

v.

EDVIN KARAPETIAN, an  
individual, EDWARD MINASYAN,  
an individual, LENA  
AMERKHANIAN, an individual,  
and EDO TRADING, INC., a  
California corporation,

Defendants.

CASE NO. 12-CV-04499-ODW

**PLAINTIFF'S NOTICE OF  
MOTION AND MOTION TO  
VACATE THE ORDER GRANTING  
DEFENDANTS' REVISED MOTION  
FOR SUMMARY JUDGMENT  
PURSUANT TO RULE 60(b);  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION  
OF SAMUEL G. LOCKHART IN  
SUPPORT**

**[FILED CONCURRENTLY  
HEREWITH [PROPOSED] ORDER]**

Date: September 12, 2016  
Time: 1:30 p.m.  
Crtrm: 11

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 12, 2016, at 1:30 p.m., or as soon thereafter as may be heard in Courtroom 11 of the United States District Court for the Central District of California, Plaintiff, Toyrrific, LLC, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and for the reasons set forth in

1 the accompanying Memorandum of Points and Authorities, moves this Court to  
2 vacate its Order Granting Defendants' Revised Motion for Summary Judgment  
3 entered on July 20, 2016, docket entry no. 113. Plaintiff moves to vacate said  
4 Order pursuant to Federal Rule of Civil Procedure 60(b)(1). Plaintiff asserts relief  
5 should be given from the untimely filing of the Opposition to the Revised Motion  
6 for Summary Judgment.  
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8  
9 This motion is based upon this Notice of Motion, the Declaration of Samuel  
10 G. Lockhart and any attached exhibits and the Memorandum of Points and  
11 Authorities filed and served concurrently herewith, any documents of which the  
12 Court takes judicial notice, and any pleadings or records on file herein, including  
13 the concurrently filed related motions, as well as such oral and documentary  
14 evidence or argument as may be introduced or made at the time of the hearing.  
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17 Respectfully submitted,

18 //S//Samuel G. Lockhart

19 LOCKHART LAW FIRM, APC #256152  
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21 Murrieta, CA 92562  
22 *Counsel for Plaintiff*  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Due to Plaintiff's attorney's mistake, inadvertence and/or excusable neglect, Plaintiff's Opposition to Defendants' Revised Motion for Summary Judgment was filed two days late<sup>1</sup>. As a result, the Court took the subject motion as unopposed and deemed all facts stated by Defendants as undisputed. Based in part on this, the court granted summary judgment against Plaintiff. Now, Plaintiff moves for relief from the Court's Order Granting Defendants' Revised Motion for Summary Judgment pursuant to Rule 60(b)(1). In *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253 (9th Cir. 2010), the Ninth Circuit found that an opposition to a motion for summary judgment that was filed three days late due to a calendaring mistake was grounds for relief, as a matter of law. Based on clear Ninth Circuit law, and the facts here, relief should be granted.

### II. PROCEDURAL HISTORY

This matter was remanded by the Ninth Circuit Court in June, 2015. The Clerk was ordered to reopen this case on June 30, 2015. Approximately two months later, on September 3, 2015, Defendants filed a Motion for Leave to File Motion for Reconsideration of Court's Order on Defendants' Motion for Summary Judgment. On September 14, 2015, Plaintiff filed an Opposition to

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<sup>1</sup> Plaintiff's Opposition to the Motion to Vacate the Order Granting Defendant's Revised Motion for Summary Judgment was filed two days late and the Statement of Genuine Disputes three days late. The Opposition and Statement of Genuine Disputes were filed as soon as they were drafted, the Opposition was completed first, and the Statement of Genuine Disputes followed the next day.

1 Defendants' Motion for Leave to File Motion for Reconsideration of Court's  
2 Order on Defendants' Motion for Summary Judgment. Approximately three  
3 months later, the Court entered an Order Denying Defendants' Motion for Leave  
4 to File Motion for Reconsideration, wherein the Court found Defendants' motion  
5 to be moot. The Court ordered the Defendants to file a revised Motion for  
6 Summary Judgment on only the issues that the Ninth Circuit instructed the Court  
7 to consider and to secure a hearing date no later than March 21, 2016.  
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10 The Defendants set a hearing for March 21, 2016 and filed their Revised  
11 Motion for Summary Judgment on February 22, 2016. Plaintiffs filed an  
12 Opposition to Defendants' Revised Motion for Summary Judgment on March 2,  
13 2016 and a Statement of Genuine Disputes on March 3, 2016. Defendants filed a  
14 Reply to Plaintiff's Opposition and a supporting Declaration on March 7, 2016.  
15 In it they pointed out the Opposition was untimely.  
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18 Plaintiff's counsel, Samuel G. Lockhart, filed a Declaration on March 8,  
19 2016 requesting the Court to consider Plaintiff's two day late Opposition due to  
20 his excusable neglect; Plaintiff's counsel intended this to be a request for relief  
21 under Rule 6 or Rule 60(b) On March 9, 2016, Plaintiff also filed a Declaration by  
22 Kevork Kouyoumjian in support of Plaintiff's Opposition. On March 11, 2016  
23 Defendants filed Objections to and Request to Strike Plaintiff's Untimely  
24 Declaration and Opposition. On March 16, 2016, the Court vacated the March 21,  
25 2016 hearing and took the matter under advisement. On July 20, 2016 the Court  
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1 entered an Order Granting Defendants' Revised Motion for Summary Judgment.  
2 The Court's order never specifically addressed Mr. Lockhart's declaration or  
3 request by Plaintiff to be relieved from the mistake. As such, Plaintiff seeks relief  
4 pursuant to the previously filed declaration as allowed under Rule 6(b) and now,  
5 post Order, pursuant to Rule 60(b).  
6

7 **III. THE COURT SHOULD GRANT RELIEF FROM THE LATE-FILED**  
8 **OPPOSITION AND VACATE ITS SUMMARY JUDGMENT ORDER.**  
9

10 **A. The Legal Standard For Relief Under Rule 60(b)**

11 The Ninth Circuit has stated that "Procedure 'is a means to an end, not an  
12 end in itself – the 'handmaid rather than the mistress' of justice.' [citations] While  
13 district courts enjoy a wide latitude of discretion in case management, this  
14 discretion is circumscribed by the courts' overriding obligation to construe and  
15 administer the procedural rules so as 'to secure the just, speed, and inexpensive  
16 determination of every action and proceeding.'" *Ahanchian v. Xenon Pictures,*  
17 *Inc.*, 624 F. 3d 1253 (9th Cir. 2010)(citing Charles E. Clark, *History, Systems and*  
18 *Functions of Pleading* 11 Va. L. Rev. 517, 542 (1925); Fed R. Civ. P. 1.) Federal  
19 Rule of Civil Procedure 60(b)(1) provides as follows: "On motion and just terms,  
20 the court may relieve a party or its legal representative from a final judgment,  
21 order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise,  
22 or excusable neglect."  
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1 “To determine whether a party’s failure to meet a deadline constitutes  
 2 ‘excusable neglect,’ courts must apply a four-factor equitable test, examining: (1)  
 3 the danger of prejudice to the opposing party; (2) the length of the delay and its  
 4 potential impact on the proceedings; (3) the reason for the delay; and (4) whether  
 5 the movant acted in good faith. *Ahanchian*, 624 F.3d at 1261(citing *Pioneer Inv.*  
 6 *Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993); *Briones v.*  
 7 *Riviera Hotel and Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (adopting this test  
 8 for consideration of Rule 60(b) motions). It is an abuse of discretion for the Court  
 9 to fail to correctly conduct the test identified above, referred to as the  
 10 “*Pioneer/Briones Test*.” See *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 -  
 11 1224 (9th Cir. 2000). Additionally, *per se* rules, are not consistent with the  
 12 application of Rule 60(b). See *Pincay v. Andrews*, 389 F.3d 853, 859-860 (9th  
 13 Cir. 2004) (The court incorrectly concluded that “a calendaring mistake is the type  
 14 of ‘inadvertent mistake’ that is not entitled to relief pursuant to Rule 60(b)(1)”).  
 15 Rule 60(b) is ‘remedial in nature and...must be liberally applied.’” *TCI Group*  
 16 *Life Ins. v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001))(quoting *Falk v. Allen*,  
 17 739 F.2d 461, 463 (9th Cir. 1984).

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 19 **B. Relief Is Warranted After Application of the *Pioneer/Briones Test***

20 Each of the four factors is addressed below. Before addressing each factor  
 21 separately, a quick look at *Ahanchian* and *Pincay* shows relief is warranted.  
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1 In *Pincay*, the Ninth Circuit held that a paralegal's calendaring error alone  
2 was sufficient to warrant a finding of excusable neglect after the application of the  
3 balancing test set forth by the United States Supreme Court for determining  
4 excusable neglect, the court found that the error was no overly prejudicial did not  
5 result in an unreasonable delay and Plaintiff's attorney had acted in good faith.  
6 *Pincay v. Andrews*, 389 F.3d at 853. As indicated above, this test is referred to as  
7 the "*Pioneer/Briones Test*" and it is an abuse of discretion not to consider each of  
8 its four factors in determining the existence of excusable neglect: (1) the danger of  
9 prejudice to the opposing party; (2) the length of the delay and its potential impact  
10 on the proceedings; (3) the reason for the delay; and (4) whether the movant acted  
11 in good faith. *Ahanchian*, 624 F.3d 1261; *Bateman v. U.S. Postal Serv.*, 231 F.3d  
12 at 1223 -1224.

13  
14 In *Ahanchian*, the Ninth Circuit overturned a decision of the district court  
15 that refused to grant relief under Rule 60(b). The Court of Appeals found that an  
16 opposition to a motion for summary judgment that was filed three days late due to  
17 a calendaring mistake was grounds for relief, as a matter of law. It noted that the  
18 delay was minimal, there would be no prejudice by a short extension for either  
19 side, and that while a calendaring mistake caused by the failure to apply a clear  
20 local rule may be a weak justification for an attorney's delay, the Ninth Circuit has  
21 previously found the identical mistake to be excusable neglect (also noting far less  
22 persuasive excuses have been relieved) and there was no indication there was any  
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1 bad faith. This case makes clear that the relief sought is required here when there  
2 was a two to three day delay, no prejudice, a justifiable excuse due to calendaring,  
3 and no bad faith. *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 -1224 (9th  
4 Cir. 2000) (Granting relief when an attorney failed to file a timely opposition to  
5 MSJ and wrote to the court twelve days after the Order and filed the Rule 60(b)  
6 motion a little more than a month after the court denied his request; the failure to  
7 file was negligent and careless, but not deviousness or willfulness).  
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10 As detailed below, applying the four factors in this case demonstrates relief  
11 is warranted.  
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13 (a) *The Danger of Prejudice to the Opposing Party*

14 “Prejudice requires greater harm than simply that relief would delay  
15 resolution of the case.” *TCI Group Life Ins. Plan*, 244 F.3d at 701. The two day  
16 late filing of Plaintiff’s Opposition to Defendants’ Revised Motion for Summary  
17 Judgment did not prejudice the Defendants, other than to require the Defendants  
18 two days less time to file their reply. However, in *Ahanchian* the Defendants  
19 similarly argued that a late filing would result in less time to file its reply and the  
20 court flatly rejected that argument by stating, “[m]oreover, defendants' argument  
21 that they would be prejudiced by only having a week to reply while *Ahanchian*  
22 would have had several weeks to draft an opposition is unpersuasive and neglects  
23 the fact that in the overwhelming majority of districts, more time is given for  
24 drafting oppositions than for drafting replies.” *Ahanchian*, 624 F.3d at 1260. Here,  
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1 Defendants actually filed their Reply so there is no prejudice in considering the  
2 Opposition. Moreover, had Defendants sought an extension of time to file a  
3 Reply, Plaintiff certainly would have stipulated to such a request out of  
4 professional courtesy, not to mention the fact that it would have aided in  
5 Plaintiff's attempt to have the Court consider its tardy Opposition. *Ahanchian*, 624  
6 F.3d at 1261.  
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9 *(b) The Length of the Delay and Its Potential Impact on the Proceedings*

10 "As to the second factor, the length of the delay in filing the request for  
11 relief, Federal Rule of Civil Procedure 60(c) requires that a Rule 60(b) motion be  
12 made 'within a reasonable time' and 'no more than a year after the entry of the  
13 judgment or order or the date of the proceeding.' 'What constitutes 'reasonable  
14 time' depends upon the facts of each case, taking into consideration the interest in  
15 finality, the reason for delay, the practical ability of the litigant to learn earlier of  
16 the grounds relied upon, and prejudice to the other parties.'" *Lemoge v. United*  
17 *States*, 587 F.3d 1188, 1197 (9th Cir. 2009)(quoting *Ashford v. Steuart*, 657 F.2d  
18 1053, 1055 (9th Cir. 1981)(per curiam)). In *Lemoge* the court found that seeking  
19 relief pursuant to Rule 60(b) within seven months of the subject case being  
20 dismissed and two months after the subject attorney returned to practice was a  
21 reasonable time frame. (*Id.*) The subject Order from which Plaintiff seeks relief  
22 was entered on July 20, 2016. Plaintiff brings its 60(b) motion less than three  
23 weeks after entry of the Order which is both reasonable and well within the one  
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1 year deadline. In fact, Plaintiff sought relief before entry of the Order through  
2 counsel's declaration filed 133 days before the Court's Order issued. It is also  
3 brought less than 28 days after under Rule 4, and less than the time for a notice of  
4  
5 appeal.

6 (c) *The Reason for the Delay*

7 As set forth partially in the Declaration of Samuel G. Lockhart filed on  
8 March 8, 2016, and more fully in the Declaration of Samuel G. Lockhart which is  
9 filed concurrently with this Motion, the reason for the delay was a calendaring  
10 error by Mr. Lockhart's paralegal who had, unbeknownst to Mr. Lockhart,  
11 accepted employment with another firm and was not providing the attention to  
12 detail required. The calendaring error typically would have been caught by Mr.  
13 Lockhart. However, Mr. Lockhart's wife gave birth to a little boy, Nathan, on  
14 February 7, 2016 and was recovering from a difficult labor and delivery at home  
15 which required Mr. Lockhart, who is a solo practitioner, to split time between his  
16 home office and work office. While at home Mr. Lockhart would help out with  
17 his other children and tend to his recovering wife while juggling his law practice,  
18 which resulted in a breakdown of his common practice of verifying all calendaring  
19 in his civil litigation cases. While a calendaring error is not a particularly strong  
20 excuse, it may serve as a basis for relief pursuant to Rule 60(b). *See Pincay*, 389  
21 F.3d at 859-60 (a calendaring mistake is grounds for relief for excusable neglect)  
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1 Even if the Court perceives the reasons set forth above as “weak”, in order  
2 to deny relief pursuant to Rule 60(b) the Court also must find a lack of good faith.  
3 *See Ahanchian*, 624 F. 3d 1253, 1262.)(“while a calendaring mistake caused by  
4 the failure to apply a clear local rule may be a weak justification for an attorney’s  
5 delay, we have previously found the identical mistake to be excusable neglect, as  
6 stated in *Pincay*.)

7  
8  
9 (d) *Whether the Movant Acted In Good Faith*

10 The focus of the application of the *Pioneer/Briones Test* in this matter should  
11 be on Plaintiff’s attorney, as the Plaintiff had no involvement in the late filing.  
12 *See Pioneer Inv. Servs.* 507 U.S.397-399. (“Consequently, in determining whether  
13 respondents’ failure to file their proofs of claim prior to the bar date was  
14 excusable, the proper focus is upon whether the neglect of respondents *and their*  
15 *counsel* was excusable. ...We conclude that...this case requires a finding that the  
16 neglect of respondents’ counsel was, under all circumstances, “excusable.”)

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18  
19 Counsel for Plaintiff, Samuel G. Lockhart, did not discover that he had  
20 missed the deadline to file an Opposition to Defendants’ Revised Motion for  
21 Summary Judgment until after the deadline had already passed. However, very  
22 soon after making that discovery he promptly prepared and filed the Opposition  
23 and accompanying documents as they became available. A few days later the  
24 Defendants presented as their lead argument in their Reply that Plaintiff’s  
25 Opposition should not be considered and that their Revised Motion for Summary  
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1 Judgment be considered solely on that basis. Mr. Lockhart then promptly  
2 submitted a declaration pursuant to Rule 6(b) requesting that the Court consider  
3 Plaintiff's untimely Opposition and set forth the reasons for the tardy filing.  
4

5 Plaintiff's counsel did not seek a stipulation from the Defendants to extend  
6 the filing deadline because the Defendants, in response to Mr. Lockhart's  
7 declaration asking the Court to consider the untimely Opposition, once again  
8 objected to the untimely Opposition, demanding that the Court refuse to consider  
9 the Opposition. Thus, Plaintiff's counsel thought it futile to seek the stipulation  
10 and instead opted to wait to file a Rule 60(b) motion should the Court refuse to  
11 consider Plaintiff's untimely Opposition. While seeking to address the untimely  
12 filing through a declaration submitted pursuant to Rule 6(b) is not required, it is a  
13 prima facie showing of good faith.  
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17 In short, Mr. Lockhart's actions were in good faith and devoid of any  
18 willfulness or deviousness as is required to deny relief under Rule 60(b). *See*  
19 *Bateman*, 231 F.3d at 1225.  
20

### 21 **C. The Golden Rule Is Ignored By Defendants.**

22 "Our adversarial system relies on attorneys to treat each other with a high  
23 degree of civility and respect. [citation]("[A]t the risk of sounding naïve or  
24 nostalgic, we lament the decline of collegiality and fair-dealing in the legal  
25 profession today, and believe courts should do what they can to emphasize these  
26 values."); [citation]("There is no better guide to professional courtesy than the  
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1 golden rule: you should treat opposing counsel the way you yourself would like to  
2 be treated.”). Where, as here, there is no indication of bad faith, prejudice, or  
3 undue delay, attorneys should not oppose reasonable requests for extensions of  
4 time brought by their adversaries.” *Ahanchian*, 624 F.3d at 1263; *See Cal.*  
5 *Attorney Guidelines of Civility & Prof.* § 6.  
6

7 Here, Plaintiff’s counsel’s declaration may reasonably be construed as a  
8 request for an extension after the deadline for filing the subject Opposition had  
9 already passed (as made clear by other cases) and Defendants’ subsequent demand  
10 for the Court to refuse to consider the untimely Opposition may be taken as a  
11 rejection of that request. The practice of law is not easy. It requires a great deal  
12 of attention to detail and Rule 60(b), which is to be applied liberally, is the  
13 codification of the notion that there are times in attorneys’ lives where some  
14 leeway should be granted to the errant attorney who in good faith fails to meet a  
15 deadline. *See Laurino v. Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir.  
16 2002)(“We conclude that ‘there is no evidence that [Caruana] acted with anything  
17 less than good faith. ‘His errors resulted from negligence and carelessness, not  
18 from deviousness or willfulness.’”); *Bateman*, 231 F.3d at 1225. This is one of  
19 those circumstances where Plaintiff’s counsel was negligent in the late filing, but  
20 also one where the resultant error was not derived from deviousness or  
21 willfulness. Instead, Plaintiff’s counsel acted in good faith both prior and  
22 subsequent to the discovery of his negligence in filing an Opposition two days  
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1 late. Thus, Plaintiff is entitled to relief from the Court's Order Granting  
2 Defendants' Revised Motion for Summary Judgment.

3 **IV. CONCLUSION**

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5 Based on the foregoing, Plaintiff respectfully requests that the Court grant  
6 its Motion for Relief from Final Order in the above matter and consider Plaintiff's  
7 Opposition to Defendants' Motion for Summary Judgment in ruling on said  
8 motion for summary judgment.  
9

10  
11  
12 Dated: August 4, 2016

**LOCKHART LAW FIRM, A.P.C.**

13 By: //S// SAMUEL G. LOCKHART  
14 Samuel G. Lockhart  
15 Attorneys for Plaintiff  
16 TOYRRIFIC, LLC  
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